

Matter of: Simpson Contracting Corporation

File: B-254663

Date: December 17, 1993

Mike Simpson for the protester,
Col. Riggs L. Wilks, Jr., and Maj. Wendy A. Polk, Department
of the Army, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Agency decision to conduct a procurement for paving maintenance services on an unrestricted basis and not as a small disadvantaged business (SDB) set-aside was reasonable where the agency concluded, based on the lack of responses from SDB concerns to a Commerce Business Daily advertisement and the procurement history, that it could not reasonably expect to receive bids from at least two responsible SDB concerns at prices not exceeding the fair market price by more than 10 percent.

DECISION

Simpson Contracting Corporation protests that invitation for bids (IFB) No. DABT63-93-B-0017, issued by the Department of the Army for paving maintenance at Fort Huachuca, Arizona, should be set aside for small disadvantaged business (SDB) concerns.

We deny the protest.

The Army published a synopsis in the Commerce Business Daily (CBD) on July 2, 1993, announcing that the procurement of all labor, equipment, and material necessary to perform paving maintenance at Fort Huachuca was being considered for an SDB set-aside. The advertisement stated that the award of a requirements contract for a base year with four 1-year options was contemplated, and that the estimated total cost of the project was between \$5 and \$10 million. The advertisement instructed interested SDB concerns to provide the contracting officer with a statement of their technical capabilities and financial status. The synopsis also

advised that if adequate interest was not received from SDB concerns, the RFP would be issued on an unrestricted basis.

The contracting officer received correspondence from nine firms regarding this procurement. The contracting officer determined, upon reviewing the correspondence submitted, that only three of the nine firms even claimed to be SDB concerns. Further, only one of the firms submitted any information concerning its technical capability and financial status, and this firm subsequently contacted the Army to advise that it was no longer interested in the project. The protester did not respond to the CBD advertisement.

Based on the responses to the CBD advertisement and procurement history, the contracting officer determined, with the concurrence of the Fort Huachuca Small and Disadvantaged Business Utilization Specialist and the Small Business Administration's Procurement Center Representative, that the IFB should be issued on an unrestricted basis and not as a total set-aside for SDB concerns. On August 13, the agency issued the IFB on an unrestricted basis.

The regulations implementing the Department of Defense SDB program, set forth at DFARS part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns; (2) award will be made at a price not exceeding the fair market price by more than 10 percent; and (3) scientific and/or technical talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a); All Star Maintenance, Inc., B-249810.3, Nov. 24, 1992, 92-2 CPD ¶ 374. We generally view this determination as a business judgment within the contracting officer's discretion, and we will not disturb a contracting officer's set-aside determination unless it is unreasonable. McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318. However, a contracting officer must undertake reasonable efforts to ascertain whether it is likely to receive offers that would support a decision to set aside a procurement for SDB concerns, and we will review a protest to determine whether a contracting officer has done so. See Neil R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269.

¹The IFB does provide that an evaluation preference will be accorded to SDB concerns by adding a factor of 10 percent to the offers of non-SDB concerns for evaluation purposes. See Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.7000-7003; 252.219-7006.

The record here shows that the contracting officer undertook reasonable efforts to ascertain whether there would be two or more responsible SDB concerns that could submit bids that would result in contracts at reasonable prices in deciding not to set aside the procurement. First, as noted above, the Army advertised the procurement in the CBD to ascertain whether there was sufficient interest from qualified SDB concerns to set aside the IFB for only SDB firms, and received only three responses from firms claiming to be SDB concerns.² Only one firm provided any of the requested information concerning management capabilities and financial status, and this firm subsequently advised the agency that it was no longer interested in competing for the requirement. Also, as noted above, Simpson did not respond to the CBD advertisement.

Second, the Army considered its procurement history for similar services, and found that there has been little competition for the paving maintenance requirement in the past, even though the predecessor contract was awarded under a solicitation issued on an unrestricted basis, and that these services have never been acquired from an SDB concern. The agency also explains that the work generally appeals only to local firms because the asphaltic materials required must be used at precise temperatures and cannot be hauled long distances without several problems, including the possibility of expensive loss due to crusting of the materials during transport and the danger of fire from maintaining the materials during transport at the necessary temperatures. The agency further notes that the equipment required to perform the work is extremely expensive, and that it is simply unaware of any interested SDB concerns capable of performing the work required.

Based on this record, we conclude that the contracting officer's determination to issue the IFB on an unrestricted basis was reasonable. That is, the contracting officer made a reasonable effort to ascertain the interest of SDB concerns in competing for the contract work and reasonably determined from the information available that there was not

²Also, contrary to Simpson's allegation, this solicitation was posted on the Fort Huachuca contracting officer's bulletin board.

a reasonable expectation of receiving offers from at least two responsible SDB concerns at a price not exceeding the fair market price by 10 percent. McGhee Constr., Inc., supra.

The protest is denied.

James F. Hinchman
General Counsel